**HIGH COURT OF CHHATTISGARH AT BILASPUR**

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**Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.**

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**Criminal Appeal No.1094 of 1989**

Kanwal and others

versus

The State of Madhya Pradesh (now Chhattisgarh)

**JUDGMENT**

Post for 13 -11-2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

(S1) A.F.R.

**HIGH COURT OF CHHATTISGARH AT BILASPUR**

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**Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.**

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**Criminal Appeal No.1094 of 1989**

**Appellants**

1. Kanwal, aged bout 21 years, son of Mohanlal, R/o Lenga, P.S. Lakhanpur, Distt. Surguja (**DEAD**)
2. Boyaram, aged about 21 years, son of Mangal Sai, R/o Lenga, P.S. Lakhanpur, Distt. Surguja
3. Naresh alias Ram Naresh, aged about 22 years, son of Deonarain alias Dadu, R/o Jai Nagar Gopalpur, P.S. Jainagar, Distt. Surguja

versus

**Respondent**

The State of Madhya Pradesh (now Chhattisgarh)

Criminal Appeal under Section 374(2) of the Code of Criminal Procedure, 1973

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Present : Appellants by Shri A.K.Prasad, learned counsel.
Respondent by Shri Akhil Agrawal, learned Panel Lawyer.

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**JUDGMENT**

**(Delivered on this 13th day of November, 2007)**

Appellants Boyaram and Naresh @ Ram Naresh have assailed the judgment dated 04-11-1989 delivered by the Ist Additional Sessions Judge, Ambikapur in Sessions Trial No.139/88, whereby they have been convicted under Section 376 of the Indian Penal Code for committing gang rape and were sentenced to rigorous imprisonment for 10 years.

(2) It is not in dispute that co-accused Kanwal, who was also convicted under Section 376 of the Indian Penal Code and sentenced as above, has died during the pendency of this appeal.

(3) Briefly stated the prosecution story is that on 17-10-1987 at about 3:00 P.M., in Phulwar Dhodga of Village Lainga, Police Station Lakhanpur, the prosecutrix, aged about 15 years, was returning home with Bundeli, P.W.-3 and Gautinbai, D.W.-1 after collecting timber from the forest. The appellants, along with Kanwal, intercepted her on way and threw the timber. Kanwal and the two appellants caught hold of the prosecutrix and dragged her to the Phulwar Dhodga and fell her on the ground. Bundeli, P.W.-3 and Gautinbai, D.W.-1 ran away and informed Sikoolram, P.W.-2 and Raspatiya, P.W.-4, the parents of the prosecutrix. Mounting himself on the prosecutrix, Kanwal, after lifting her saree and saya, committed rape on her while Boyaram and Naresh held her. Thereafter, Boyaram committed rape on her while Kanwal and Naresh held her. Lastly, Naresh committed rape on her while Kanwal and Boyaram held her. Upon learning about the occurrence from Bundeli, P.W.-3, Sikoolram, P.W.-2 and Raspatiya, P.W.-4 reached the spot and apprehended Kanwal while the two appellants ran away.

(4) First Information Report, Ex.P-1 was lodged by the prosecutrix on the next day, i.e., 18-10-1987 at 10:30 A.M. at Police Station Lakhanpur situated 30 Kilometers away from the place of occurrence. Dr. Smt. Shashi Prabha Jaiswal, P.W.-5 examined the prosecutrix on 19-10-1987 and found on internal examination that the vulva was swollen, discharged blood stains were present. Tenderness was present, hymen was ruptured and was bleeding at three places on touch. Due to pain, the prosecutrix was not allowing per vaginal examination. Slides were prepared. It was opined that the prosecutrix had been subjected to sexual intercourse. Kanwal was arrested on 21-10-1987 while the two appellants were arrested on 02-11-1987. On medical examination, Dr. I.D.Bhatnagar,

P.W.-7 found that Kanwal and the two appellants were capable of performing sexual intercourse.

(5) The green coloured petticoat and the red saree of the prosecutrix were examined by Dr. Smt. Shashi Prabha Jaiswal, P.W.-5 on 19-10-1987 who found stains like semen and blood on both. Chemical examination was advised. Since Naresh @ Ram Naresh was not named in the F.I.R., test identification parade was held by Tulsai, P.W.-9 on 06-11-1987. The prosecutrix, P.W.-1, Bundeli, P.W.-3, Sikoolram, P.W.-2 and Raspatiya, P.W.-4 identified the appellant Naresh @ Ram Naresh. After completion of investigation, the two appellants and Kanwal were prosecuted for an offence of gang rape under Section 376 read with Section 34 of the Indian Penal Code.

(6) The appellants abjured the guilt, pleaded innocence and examined Gautinbai, D.W.-1, who deposed that while returning from the forest, the load of timber carried by the prosecutrix was hit by the shoulder of Kanwal and fell down. The prosecutrix shouted, whereupon Gautinbai, D.W.-1 and Bundeli, P.W.-3 left the place of occurrence and reached home. The prosecution examined as many as 17 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted the appellants under Section 376 of the Indian Penal Code for committing gang rape on the prosecutrix and sentenced the appellants as shown above in paragraph 1.

(7) Shri A.K.Prasad, learned counsel for the appellants has argued that the appellant Naresh @ Ram Naresh was not named in the F.I.R. and the test identification parade conducted by Tulsai, P.W.-9 loses its value in the eye of law because Tulsai, P.W.-9 had admitted in cross-examination that

at the time of test identification parade, the Station House Officer of Police Station Lakhanpur was present and was asking the witnesses to identify Naresh @ Ram Naresh. It was further argued that the testimony of the prosecutrix, that she was raped one after another by Kanwal, Boyaram and Naresh while two of them held her, is rendered unworthy of credit in view of the testimony of Raspatiya, P.W.-4, the mother of the prosecutrix, that upon being informed by Bundeli, P.W.-3, when she reached the place of occurrence with Sikoolram, P.W.-2, she saw that Kanwal was committing rape on the prosecutrix while Naresh and Boyaram had held her. On seeing them, the appellants started to run away, whereon her husband Sikoolram, P.W.-2, caught hold of Kanwal. This was further corroborated by the prosecutrix in paragraph 11 that her father had caught hold of only Kanwal while Boyaram and Naresh had fled. In this manner, it was argued that the testimony of the prosecutrix, that the appellants had also committed sexual intercourse with her, is rendered wholly unworthy of credit. It was also contended that the testimony of Raspatiya, P.W.-4 also rendered the testimony of Sikoolram, P.W.-2, that on reaching the place of occurrence he saw the appellant Naresh committing sexual intercourse with the prosecutrix, wholly unworthy of credit. On these premises, it was urged that the prosecution has failed to establish the guilt of the appellants for the offence under Section 376 of the Indian Penal Code beyond the shadow of doubt.

(8) On the other hand, Shri Akhil Agrawal, learned Panel Lawyer for the respondent/State argued in support of the impugned judgment.

(9) Having considered the rival submissions, I have perused the record. The prosecutrix deposed that while returning from the forest after collecting timber near Phulwar Dhodga, Kanwal, Boyaram and Naresh met

her and throwing away the bundle of teak wood, they took her towards the Dhodga (meaning: a small pit) and after felling her on the ground, the appellant Kanwal mounted on her and lifting her saree and saya committed sexual intercourse while the two appellants held her. She further stated that thereafter Boyaram and Naresh @ Ram Naresh also committed sexual intercourse while the other two perpetrators of the crime held her. The testimony of the prosecutrix regarding painful sexual intercourse with her finds corroboration from the testimony of Dr. Smt. Shashi Prabha Jaiswal, P.W.-5.

(10) The only question that arises for determination is whether the testimony of the prosecutrix, that the appellants also committed sexual intercourse with her or facilitated Kanwal in committing sexual intercourse with her by holding her hands, inspires confidence or not. Bundeli, P.W.-3 and Gautinbai, D.W.-1 did not speak about the commission of any sexual intercourse with the prosecutrix by either of the appellants or by Kanwal. Bundeli, P.W.-3 stated that after the load of timber on the head of the prosecutrix was thrown on the ground by Kanwal, she fled to the village and informed the mother of the prosecutrix. Gautinbai, D.W.-1, a witness for the prosecution, who was examined as a defence witness, has given a totally different version as she did not speak about the presence of the appellants at the scene of occurrence. She stated that when the load of timber fell down due to being hit by the shoulder of Kanwal, the prosecutrix shouted and thereafter she, along with the prosecutrix and Bundeli, P.W.-3, returned home. In this manner, Bundeli, P.W.-3 and Gautinbai, D.W.-1 did not speak about the presence of the appellants at the place of occurrence, i.e., the Dhodga.

(11) Raspatiya, P.W.-4 and Sikoolram, P.W.-2 are the parents of the prosecutrix, who reached the place of occurrence on being informed by Bundeli, P.W.-3. Their testimony is contradictory. Raspatiya, P.W.-4 deposed that on reaching the place of occurrence she saw Kanwal committing sexual intercourse with the prosecutrix while the two appellants, who had held her, fled on seeing them. Her husband caught hold of Kanwal. As against this, Sikoolram, P.W.-2 stated that on reaching the place of occurrence, he saw Naresh committing sexual intercourse with the prosecutrix while Kanwal and Boyaram held her. Raspatiya, P.W.-4 is the mother of the prosecutrix and there is nothing in her testimony to show that what she was stating was not true. The admission of the prosecutrix in paragraph 11 that on reaching the place of occurrence, her father had caught hold of Kanwal while Boyaram and Naresh fled also corroborates the testimony of Raspatiya, P.W.-4 that Kanwal was committing sexual intercourse with the prosecutrix when they reached the place of occurrence because had it not been so, Sikoolram, P.W.-2 would have caught hold of Naresh, who, according to him, was indulged in the act of committing sexual intercourse with the prosecutrix. The testimony of Sikoolram, P.W.-2 is, thus, rendered doubtful.

(12) So far as the question of test identification parade is concerned, the appellant Naresh @ Ram Naresh was not named by the prosecutrix in the F.I.R. Tulsai, P.W.-9, who conducted the test identification parade, has categorically stated in cross-examination that the Station House Officer of Police Station Lakhanpur was present and was pointing to the appellant Naresh @ Ram Naresh while asking the witnesses to identify him. The test identification report, Ex.P-14, thus, loses its value in the eye of law.

(13) The prosecutrix has ~~also~~ admitted in paragraph 8 that Kanwal had married her three months after the occurrence. Sikoolram, P.W.-2 has also admitted in paragraph 10 that immediately after reaching the place of occurrence, he had asked Kanwal to marry the prosecutrix because he had committed sexual intercourse with her. Sikoolram, P.W.-2 has also admitted that on getting hold of Kanwal, he gave five lathi blows to Kanwal and told him that if he loved his daughter then instead of committing rape he ought to have married her. Had he seen Naresh committing sexual intercourse with the prosecutrix, he would have said this to Naresh. He further admitted that he had thereafter got the prosecutrix married to Kanwal. The inference that Boyaram and Naresh did not actually commit sexual intercourse with the prosecutrix also finds support from the above. Thus, a serious doubt is created in the prosecution evidence as to whether the appellants had committed sexual intercourse with the prosecutrix.

(14) The prosecutrix has categorically stated in paragraph 20 that after throwing the load of timber on her head, it was only Kanwal who had held her and taken her towards the Dhodga. She has further admitted in paragraph 24 that Sikoolram, P.W.-2, on reaching the place of occurrence, did not chase the appellants, but had only caught hold of Kanwal. Bundeli, P.W.-3, who is an eye-witness, has also categorically stated in paragraph 5 that only Kanwal had held the prosecutrix by her hand. She did not depose that the appellants had also held the prosecutrix or dragged her towards the Dhodga. A specific question was put to Sikoolram, P.W.-2 by the defence that there was an illicit relationship between Kanwal and the prosecutrix, which was denied.

(15) In view of the above discussion, it is clear that the test identification of the appellant Naresh @ Ram Naresh conducted by Tulsai, P.W.-9 has

no value in the eye of law. The appellant Naresh @ Ram Naresh was not named in the F.I.R. The testimony of Raspatiya, P.W.-4 renders it highly improbable and doubtful that the appellants had committed sexual intercourse with the prosecutrix. The admission of Bundeli, P.W.-3, that only Kanwal had dragged the prosecutrix and the admission by the prosecutrix that her father had caught hold of Kanwal only at the place of occurrence, also renders the testimony of the prosecutrix doubtful, that sexual intercourse with her was committed by the appellants also.

(16) It is true that the testimony of the prosecutrix regarding sexual intercourse finds corroboration from the medical evidence, but in view of the above mentioned circumstances, an element of doubt exists that the appellants neither assisted Kanwal in committing sexual intercourse with the prosecutrix nor committed sexual intercourse with her after Kanwal did. The possibility, that the appellants were falsely roped in for assisting and facilitating Kanwal in commission of rape and thereafter in committing sexual intercourse with the prosecutrix one after the other, cannot be ruled out. This possibility cannot be ruled out also in view of the fact that the Station House Officer of Police Station Lakhanpur was present during the test identification parade and was asking the witnesses to identify the appellant Naresh @ Ram Naresh, who was not named in the F.I.R., by pointing towards him.

(17) In ***Raghunath* vs. *State of Haryana and another*, (2003) 1 SCC 398**, the Apex Court made the following observation:

> "**33.** In the facts and circumstances recited above, we are clearly of the view, that the prosecution has not come up with the true story. It has suppressed the facts. If that be the case, the whole prosecution story would stand on quicksand. The prosecution

> has failed to establish its case beyond reasonable doubts. It is now a well-settled principle of law that if two views are possible, the one in favour of the accused and the other adversely against it, the view favouring the accused must be accepted."

(18) It is indeed true that the burden is on the prosecution is to prove the guilt of the accused beyond reasonable doubt. This is a rule of caution laid down by Courts of law in respect of assessing the evidence in criminal cases. In ***Vijayee Singh and others* vs. *State of U.P.*, AIR 1990 SC 1459**, the Apex Court has succinctly explained the concept of reasonable doubt as under:

> "It can be argued that the concept of 'reasonable doubt' is vague in nature and the standard of 'burden of proof' contemplated under S. 105 should be somewhat specific, therefore, it is difficult to reconcile both. But the general principles of criminal jurisprudence, namely, that the prosecution has to prove its case beyond reasonable doubt and that the accused is entitled to the benefit of a reasonable doubt, are to be borne in mind. The "reasonable doubt" is one which occurs to a prudent and reasonable man. S. 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement

> of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived at in the circumstances before a fact can be said to be proved. A fact is said to be disproved when the Court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by 'a prudent man'."

(19) Once a serious doubt is created in the prosecution story and the commission of sexual intercourse by both the appellants with the prosecutrix is rendered improbable, then this part of the F.I.R., Ex.P-1 and the testimony of the prosecutrix, that both the appellants held her while Kanwal was committing rape, are also brought under a heavy cloud of suspicion and it appears that the prosecution has not come up with the true story. Under such circumstances, it can be said that a reasonable doubt that the prosecution has failed to prove the guilt of the appellants for the offence under Section 376 of the Indian Penal Code exists. In the light of the facts and circumstances referred to, the possibility, that the appellants have been falsely roped in for the offence of gang rape, cannot be ruled out. If that be the case, the whole prosecution story against the appellants would stand on quicksand and it can be said that the

prosecution has failed to establish its case against the appellants beyond reasonable doubt.

(20) In the result, the appeal is allowed. The impugned judgment, so far as it relates to the present appellants, is set aside. The appellants Boyaram and Naresh @ Ram Naresh are acquitted of the charge under Section 376 of the Indian Penal Code after giving them the benefit of doubt. Both the appellants shall be released from custody forthwith, unless required in any other case.

**Sd/-**
**Dilip Raosaheb Deshmukh**
**Judge**

Gopal